IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NATHAN WOOD, Appellant, v. CYNTHIA WOLFE, M.D., Respondent.	No. 37658-0-II UNPUBLISHED OPINION

Penoyar, J. — Nathan Wood appeals from an order dismissing the vicarious liability portion of his medical negligence claim against an emergency room physician. The superior court ruled that a stipulated release of claims against the hospital released any vicarious liability the physician had through the attending nurse because the nurse was a hospital employee. Because the release between Wood and the hospital was ambiguous and did not unequivocally preserve his claim against Dr. Cynthia Wolfe for vicarious liability, we affirm.

FACTS

On December 30, 1999, Wood was injured in a skateboarding accident, falling on a ten-inch spike that penetrated his abdomen through his buttocks. He went to Columbia Capital Medical Center (Capital Medical) where Dr. Wolfe saw him. Dr. Wolfe did not recognize that the spike had penetrated Wood as deeply as it had and did not order x-rays or other tests in assessing the injury. She concluded that Wood had suffered a two-inch flesh wound. Dr. Wolfe cleaned the wound with a saline solution and released Wood to his parents' care. She did not prescribe antibiotics and instructed the attending nurse to have Wood return in two days for a follow-up. The assisting nurse, David Gibson, misunderstood the instructions and informed Wood to either

see his family doctor or return to the emergency room on the following Monday rather than on January 1, as Dr. Wolfe had instructed.

After four days of progressively worse flu-like symptoms, Wood's parents took him to Mason General Hospital, where doctors diagnosed and treated Wood for a severe internal infection throughout his intestinal cavity. The doctors had to open Wood's abdomen and keep it open for ten days in order to apply a topical antibiotic to the infection.

Wood sued Dr. Wolfe and Capital Medical, seeking damages for having suffered extreme pain and emotional distress, permanent nerve damage affecting his right calf and right foot, and a disfiguring scar from the resulting surgery.

Dr. Wolfe worked at Capital Medical under a professional services agreement between Capital Medical and Capital Emergency Physicians, PLLC. As part of that agreement, Dr. Wolfe agreed to serve as director of the emergency services and, in part, to supervise, manage, and oversee the service in order to maintain an accepted standard of care. Another provision of that contract provided:

> Facility shall employ all non-physician technical and clerical personnel it deems necessary for the proper operation of the Service. The Director of the Service shall direct and supervise the technical work and services of such Department personnel. However, Facility retains full administrative control and responsibility for all such Services personnel.

Clerk's Papers (CP) at 91. Additionally, the agreement provided that Dr. Wolfe would "[p]rovide physician guidance to the Nursing Director and management of the Department for patient care." CP at 92.

Finally, the agreement required Dr. Wolfe to "[c]ooperate with Facility regarding

administrative, operational or personnel problems in the Service and promptly inform Facility . . . of professional problems in the Service in accordance with Medical Staff Bylaws, Rules and Regulations and Facility policy." CP at 91.

On December 21, 2005, Wood negotiated a settlement with Capital Medical. In exchange for $25,000:

> the undersigned hereby releases Capital Medical Center, . . . their heirs, executors, successors, administrators, agents, employees and assigns, none of whom admit any liability and who expressly deny any liability, but does not release Dr. Cynthia Wolfe, from any and all claims, demands, actions, causes of action, suits, costs or expenses, upon or by reason of any damage, loss, injury or suffering, known or unknown, on account of or in any way arising from, or relating to, or which may have resulted or in the future may develop from medical care and treatment rendered to me at Capital Medical Center on or about December 30, 1999. The parties hereto agree that nothing in this release is intended to release or benefit in any way Dr. Cynthia Wolfe.

CP at 56.

The matter proceeded to a trial that ended in a mistrial because of juror misconduct. Before the new trial, Dr. Wolfe filed a motion for summary judgment, arguing that the release of Capital Medical (along with its employees), released Dr. Wolfe from vicarious liability for the emergency room nurse's negligence. The trial court agreed, granted the motion, and certified the matter for appeal.

ANALYSIS

I. Standard of Review

When reviewing a summary judgment, we consider the matter de novo and make the same inquiry as the trial court; summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue about any

material fact and, assuming facts most favorable to the nonmoving party, establish that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

II. The Release's Effect

Wood acknowledges that Nurse Gibson was a Capital Medical employee and that the release absolved Capital Medical of any liability for Nurse Gibson's negligence, but he argues that Nurse Gibson acted as a dual agent: He was serving as the hospital agent with regard to his administrative duties but as Dr. Wolfe's agent with regard to his medical duties. Wood further explains that the release only applied to Nurse Gibson to the extent of his administrative duties, not his medical duties. Thus, he concludes that Dr. Wolfe remains liable for Nurse Gibson's medical negligence under the doctrine of respondeat superior.

Wood argues that even were the trial court correct in its view that Nurse Gibson's duties are not severable as a dual agent, the proper remedy is not dismissal but rescission of the release based on mutual mistake and impossibility. As to mutual mistake, he argues that both parties assumed that Dr. Wolfe would not be released and if this assumption is incorrect, the trial court should have rescinded the release. *See In re Marriage of Schweitzer,* 132 Wn.2d 318, 328, 937 P.2d 1062 (1997) (court can rescind contract where both parties are mistaken about a basic assumption underlying the agreement) (citing *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 899, 691 P.2d 524 (1984); Restatement (Second) of Contracts § 152 (1981)). As to impossibility, he argues that if it is impossible to release Capital Medical without also releasing Dr. Wolfe, the trial court should have rescinded the release rather than dismissed the claim. *See Metropolitan Park*

Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 439, 723 P.2d 1093 (1986) ("The doctrine of impossibility excuses a party from performing a contract where performance is impossible or impracticable due to extreme and unreasonable difficulty, expense, injury or loss.").

Dr. Wolfe responds that Wood's argument ignores the most central fact in this case: namely, the hospital employed Nurse Gibson and the release specifically released Capital Medical and its employees "from any and all claims." CP at 56. The release, she argues, does not say it applies only to Nurse Gibson's administrative duties; rather, it explicitly applies to *any* and *all* claims. As it is undisputed that Nurse Gibson was a hospital employee, the release specifically applied. Notably, she argues, the release does not create or recognize the distinction between administrative and medical negligence. Finally, she argues, if Wood wanted to preserve his vicarious liability claim, he could have done so in the release by specifically providing that he was not releasing Dr. Wolfe from Nurse Gibson's negligence.

A. The Release is Ambiguous

Wood first argues that the release contains no evidence of intent to release Dr. Wolfe from vicarious liability for Nurse Gibson's medical negligence. He argues that the release specifically reserved and preserved this claim by specifically not releasing Dr. Wolfe, explicitly stating that Dr. Wolfe could not "benefit in any way" from the release. He argues that releasing Dr. Wolfe for the negligence of her sub-agent, Nurse Gibson, benefits Dr. Wolfe by reducing her liability.

Both sides argue that the release's intent is clear and favors its position. We hold that the release is ambiguous.

The release clearly releases Nurse Gibson, given his status as a Capital Medical "agent" or "employee." The release also eliminates Dr. Wolfe's liability for Nurse Gibson's actions because if the agent, Nurse Gibson, is not liable then neither is the principal, Dr. Wolfe. On the other hand, the release states that it does *not* release Dr. Wolfe from "any and all claims" and says that nothing in the release is intended to "release or benefit in any way Dr. Cynthia Wolfe." CP at 56.

Of course, Wood's intent in executing this release is not controlling. Wood signed this release in a legal context stretching back at least to *Glover v. Tacoma General Hospital,* 98 Wn.2d 708, 658 P.2d 1230 (1983), and *Perkins v. Children's Orthopedic Hospital*, 72 Wn. App. 149, 864 P.2d 398 (1993):

> Even assuming that *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) requires an examination of the plaintiff's subjective intent as to meaning of the release, under these circumstances the plaintiffs' intent cannot control the legal consequences of the executed release. In *Glover* the plaintiff's intent not to release the hospital was *expressly* stated in the release. Nonetheless, the *Glover* court held the hospital was released as a matter of law following the release of the doctors/agents. The same result follows here.

Perkins, 72 Wn. App. at 162. The *Perkins* court went on to state:

> This result is not unfair to plaintiffs. In the face of *Glover*, plaintiffs are charged with the knowledge that as a matter of law they cannot release the doctors/agents and preserve the vicarious liability of the hospital/principal. If plaintiffs truly intended not to release Drs. Cohen, Furman, McCroskey, and Morray they could easily have added the phrase, "except Drs. Cohen, Furman, McCroskey, and Morray" immediately after the word "agents" in the release.

Perkins, 72 Wn. App. at 163. Finally, the court concluded:

> We hold the executed release, by its express terms, released the unnamed doctors from liability to the plaintiffs, and by operation of law the release of the doctors in turn released Children's Hospital from any claim of vicarious liability based upon the negligence, if any, of those doctors.

Perkins, 72 Wn. App. at 164.

If the release had not mentioned Dr. Wolfe, the same result would clearly follow here. This release, however, states that it does not release Dr. Wolfe from any and all claims and is not intended to benefit Dr. Wolfe. Because the parties' subjective intent is not important under *Glover* and its progeny, we consider only the language stating that the release does not release Dr. Wolfe from any and all claims.[1] This language, though, is ambiguous because it contradicts the language releasing the hospital and Nurse Gibson, which eliminates any contribution claim by them against Dr. Wolfe. Given this ambiguity and the legal context we note above, this release does not preserve Wood's vicarious liability claims against Dr. Wolfe for Nurse Gibson's actions.

As the court in *Vanderpool* explained:

> When, as in *Glover,* a plaintiff settles with a solvent agent from whom he could have received full compensation, the very foundation of the principal's liability is undermined. A principal is only secondarily liable under a respondeat superior theory. The policy reasons underlying vicarious liability (to afford the plaintiff the maximum opportunity to be fully compensated) are inapplicable when a plaintiff has accepted a release from the primarily liable tortfeasor who was financially capable of making him whole. There is no policy reason to allow that plaintiff to then pursue a claim against the defendant who is only secondarily liable.

Vanderpool v. Grange Ins. Ass'n., 110 Wn.2d 483, 487, 756 P.2d 111 (1988) (release between plaintiff and agent forecloses principal from receiving contribution from agent).

B. Mutual Mistake and Impossibility

Wood did not claim mutual mistake or impossibility below and makes these arguments for the first time on appeal. As such, we will not consider them. *Washburn v. Beatt Equip. Co*., 120 Wn.2d 246, 840 P.2d 860 (1992); RAP 2.5(a).

[1] We do not consider the language stating the parties' intent.

C. Dual Agency.

Wood argues that Nurse Gibson was an agent for both Dr. Wolfe and Capital Medical, having authority to act administratively for Capital Medical and medically for Dr. Wolfe.

"An agent is one who is to act on behalf of and subject to the control of another, a principal, when both agent and principal consent to entering into the relationship." *Thola v. Henschell,* 140 Wn. App. 70, 87, 164 P.3d 524 (2007) (citing Restatement (Second) of Agency § 1 (1958)). The doctrine of respondeat superior holds the principal liable "for physical harm caused by the negligent conduct of servants within the scope of their agency." *Cameron v. Downs*, 32 Wn. App. 875, 881, 650 P.2d 260 (1982) (citing Restatement (Second) of Agency § 243 (1958)). "To be within the scope of one's agency, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." *Cameron,* 32 Wn. App. at 881 (citing Restatement (Second) of Agency § 229(1) (1958)). Wood notes that one may be the agent of two distinct principals simultaneously. *Nyman v. MacRae Bros. Constr. Co.,* 69 Wn.2d 285, 287, 418 P.2d 253 (1966) (adopting Restatement (Second) of Agency § 226 (1958)).

Relying on these dual agency principles, Woods argues that a discharge of liability as to one principal does not discharge liability as to the other principal. He contrasts this situation to one where the person is an agent of co-principals, jointly authorizing the agent to act and thus jointly liable for the agent's negligence.

Dr. Wolfe rejects Wood's claim that she had a principal-agent relationship with Nurse Gibson, arguing that the professional services contract retained the hospital's control over Nurse Gibson:

Facility shall employ all non-physician technical and clerical personnel it deems

> necessary for the proper operation of the Service. The Director of the Service shall direct and supervise the technical work and services of such Department personnel. However, *facility retains full administrative control and responsibility for all such Services personnel.*

CP at 91 (emphasis added). Such administrative control, she argues, demonstrates that a principal-agent relationship continued to exist between the hospital and Nurse Gibson. *See Arrington v. Galen-Med. Inc.*, 838 S.2d 895, La. App. (3 Cir. 2003) (hospital asserting administrative control and responsibility over doctor may be responsible for physician's acts). In *Scott v. Pacific West Mountain Resort,* 119 Wn.2d 484, 491, 834 P.2d 6 (1992), the court held that the clause "accept full responsibility for the cost of treatment for any injury" in a skier's contract shifted the burden of liability to the skier. Finally, Dr. Wolfe points out that her contract with the hospital required the hospital to maintain insurance for its employees; a point she argues supports the notion that the hospital sought to retain control of Nurse Gibson.

Even assuming we agree with Wood's dual agency theory, it does not affect our analysis of the release's effect and, therefore, we do not address it further.

D. On The Merits

Relying on *Hansen v. Horn Rapids ORV Park,* 85 Wn. App. 424, 932 P.2d 724 (1997), Wood argues that the release did not discharge Dr. Wolfe and therefore did not discharge any derivative liability. In *Hansen,* the court observed:

> The City contends Mr. Hansen's dismissal of his claims against Tri-City Aid Service also requires dismissal of his claims against the other defendants, whose liability is founded solely on a theory of vicarious liability for Tri-City's acts. However, the rule is that ordinarily a principal is derivatively responsible for an agent's acts, unless the agent's responsibility has been discharged "on the merits and not based on a personal defense."

Hansen, 85 Wn. App. at 429 n 2 (quoting *Vern J. Oja & Assoc. v. Washington Park Towers, Inc.*, 89 Wn.2d 72, 77, 569 P.2d 1141 (1977) (quoting Restatement of Judgments § 99 (1942))). Here, Wood argues, releasing the hospital for Nurse Gibson's administrative negligence as a hospital employee was not a discharge on the merits and should not discharge Dr. Wolfe's responsibility for Nurse Gibson's negligence.

In *Hanson,* Tri City had a statutory defense, providing voluntary medical services, which protected it from liability. That is quite different from our case in that the hospital was directly liable for Nurse Gibson's negligence and had no statutory defense. Contrary to Wood's assertion, the release settled this claim and thus liability for Nurse Gibson's negligence was discharged on the merits.

E. Solvency

Wood argues that the trial court improperly relieved Dr. Wolfe of vicarious liability because there was no evidence that Nurse Gibson was solvent when he released Capital Medical. While acknowledging that a vicariously liable principal may be released if the negligent agent who caused the harm is released, this is so only if the released agent is solvent at the time:

> The release of an agent as a result of a reasonable settlement may extinguish a vicarious liability claim against the principal. After a plaintiff has settled with an agent, the trial court may discharge a principal if the Court approves the settlement as reasonable. However, in that situation, the principal is released by operation of law only where the agent is deemed "solvent." If the agent is deemed to be insolvent or incapable of making the plaintiff whole, the principal is entitled only to an offset of the settlement amount against any judgment it incurs.

Hogan v. Sacred Heart Med. Ctr., 101 Wn. App. 43, 49-50, 2 P.3d 968 (2000) (citations omitted). The rationale for this rule, he explains, is to make sure that the plaintiff can be fully

compensated for his injuries before releasing the principal. Here, he notes, if the summary judgment stands, he will never be fully compensated because Dr. Wolfe is vicariously responsible for Nurse Gibson's medical negligence, an amount he will never be able to recover.

Dr. Wolfe does not respond to this claim. While case law refers to the agent's solvency, here the solvency question is really not relevant as the hospital assumed all liability for Nurse Gibson and agreed to provide his liability insurance. The lack of evidence regarding Nurse Gibson's solvency does not justify a remand hearing.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, C.J.

Quinn-Brintnall, J.